UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

DURA-LINE CORPORATION,
A SUBSIDIARY OF MEXICHEM

and

Cases 09-CA-163289
09-CA-164263
09-CA-165972
09-CA-166481
09-CA-167265

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL-CIO-CLC

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ITS BRIEF FILED IN SUPPORT THEREOF

I. INTRODUCTION:

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Counsel for the General Counsel files this answering brief to Respondent's Exceptions to the decision of Administrative Law Judge Melissa Olivero which issued on June 20, 2017. Judge Olivero correctly concluded that Respondent violated Section 8(a)(1), (3) and (5) of the Act by closing its Middlesboro, Kentucky facility and transferring its work to other nonunion facilities in retaliation for its employees' union and/or protected concerted activities; by failing to notify and bargain with the Union over the amount of the Thanksgiving gift card; and by requiring employees to sign a confidentiality agreement that violated the Act.

A. The Administrative Law Judge Correctly Found That Respondent Closed its Middlesboro Facility and Transferred its Work to Other Facilities.

Respondent excepts to the Administrative Law Judge's finding that it transferred work from Middlesboro to other plants in retaliation for employees' protected conduct.

Respondent operates ten (10) facilities in the United States and Middlesboro was the only unionized facility. Respondent's Middlesboro employees have been represented by the Union for at least 28 years. (Tr. 75, 101, 115, 288) [1] The parties' most recent collective-bargaining agreement was effective from April 18, 2013 to April 18, 2016. (Resp. Ex. 11) Robert Hatfield has served as the local union's president since about 2011. (Tr. 145) During this tenure, Hatfield has been vigilant with respect to policing the collective-bargaining agreement. Hatfield has filed more grievances during his tenure than the two immediate predecessor local presidents. (Tr. 117, 119) Respondent's Human Resource Manager Patsy Wilhoit even admits this. (Tr. 184, 187) Respondent exhibited disdain and union animus towards Hatfield by repeatedly telling employees, including former Local President Elmer Evans that Hatfield filed too many grievances. (Tr. 191, 195; G.C. Exs. 10 and 11) and needed to be controlled. (Tr. 117-118)

General Counsel's witness and former union president, Freddie Chumley, testified that as early as 2014, during the Union's officers' election campaign period, Bruce Wasson, maintenance supervisor, asked Chumley what did the Union think it was doing with respect to all of their grievances. (Tr. 16) Wasson also repeatedly told Chumley the Union was going to get the Middlesboro plant shut down. (Tr. 16-17) Wasson also told Chumley that Union Staff Representative Tim Dean had already got one place shut down. (Tr. 16) Wasson made these comments on multiple occasions, and further questioned Chumley (Tr. 16) on numerous occasions asking Chumley what Hatfield was doing and why he was filing so many grievances. (Tr. 16)

Chumley credibly testified and without contradiction, that on several occasions during the same time period, that Patsy Wilhoit, human resources manager, told him that any time the

[1] References to the transcript will be designated as (Tr.____); General Counsel's Exhibits will be designated as (G.C. Ex. ___); Respondent's Exhibits will be designated as (Resp. Ex. ____); Joint exhibits will be designated as (Jt. Ex. ___) and references to the Administrative Law Judge's Decision will be designated as (ALJD, p. ____).

Union filed a grievance that she had to log it into the computer system and the corporate officials saw them. (Tr. 19) He further testified that Wilhoit said they did not like it. (Tr. 19) Chumley testified, with specificity, that on one occasion Wilhoit made this comment when he was requesting records with respect to Brian Brock's discharge grievance. (Tr. 19)

On at least one occasion when Wilhoit complained about the Union filing grievances, Chumley testified that he told her that the contract was what the parties had to live by whether they agreed with it or not. (Tr. 20)

Elmer Evans, a former union president, testified that he had served in several official capacities in the Union. (Tr. 116) He further testified, with great specificity, that during the last negotiations, about April 2013, about the time the union membership ratified the last contract, he told Jeff Hatfield, day shift supervisor, that he guessed they got three (3) more years and that the employees would be there three (3) more years. Evans continued testifying, that he then went and sat down in J. Hatfield's office, when J. Hatfield told him that he better enjoy it because this would be their last contract at the facility. At some point, Mike Roark, interim plant manager/production manager, joined the conversation. J. Hatfield then told Roark to tell Evans. Evans testified that Roark was confused about what he was to tell him. Evans testified that he then asked Roark if he thought that this would be their last contract. Evans credibly testified that Roark responded, "Yeah, I guarantee it'll be your last contract." (Tr. 121-122)

Evans also testified that he had daily conversations with Wasson. (Tr. 123) Evans further testified that in 2015, Wasson told him that the Union was ruining Respondent and that if R. Hatfield did not quit doing what he was doing and things did not start getting better that Mexichem did not like unions and would close the facility. Evans further testified that Wasson told him that grievances cost Respondent money and if R. Hatfield continued to file them and it cost Respondent money that Respondent would "shut this place down." (Tr. 124) Evans testified that Roark and Calhoun also made similar comments to him. (Tr. 124)

Evans testified that he and Wilhoit talked about R. Hatfield every time they met. He credibly testified, without contradiction, that Wilhoit told him that someone needs to get a hold of R. Hatfield and calm him down because he was filing too many grievances. (Tr. 117) Evans further testified that Wilhoit even told him that grievances cost Respondent fifty dollars ($50) every time R. Hatfield filed one because it had to be reviewed by the corporate lawyers. (Tr. 118) Evans continued testifying that Wilhoit even told him that something was not done with R. Hatfield that the new owners were going to shut the doors and move. (Tr.118) According to Evans, Wilhoit said that the new owners were not liking Respondent because it was unionized. (Tr. 118)

Counsel for the General Counsel asserts that two e-mails which Wilhoit either authored or to which she was a party clearly show the animus that Respondent and its officials had towards R. Hatfield and the Union. (G.C. Exs. 10 and 11) In April, Wilhoit communicated with Tamera Fraley about R. Hatfield's desire to transfer to another of Respondent's facilities. Wilhoit opined that she would like nothing more for him to transfer but in good conscience she could not recommend him for another facility. She even stated that he could possibly be on the Union's payroll to go out and organize other facilities.

General Counsel Exhibit 11 involved an e-mail where Maggie Brock, secretary/receptionist, referred to R. Hatfield as a dummy. The record is replete with other threats of closing by other supervisors, as so found by the Administrative Law Judge.

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 US 989 (1982), the Board found that when the General Counsel claims that an employer's adverse action has been taken in retaliation for employees' union and/or protected concerted activity, that it is incumbent on the General Counsel to show that employees' union activity was a motivating factor for the adverse action. Once the General Counsel meets that burden, it shifts to the employer to show that it would have taken the same action, even in the absence of employees' union or protected activity by a preponderance of the credible evidence. *T & J Trucking Co.*, 316 NLRB 771 (1995).

There is no question that under the leadership of R. Hatfield, the Union vigorously policed the collective-bargaining agreement and routinely filed grievances. Wilhoit logged these grievances onto a computer that was on a shared drive with Respondent's corporate office. (Tr. 19) Wilhoit even told an employee that every time a grievance was filed, it had to be reviewed by Respondent's corporate attorneys and it cost Respondent fifty dollars ($50). Bruce Wasson made a similar comment. (Tr. 124) Clearly, Respondent's local and corporate officials had knowledge of Hatfield's union activities.

Respondent also excepts to the Administrative Law Judge's imputing of lower level management and supervisory officials' knowledge of the union activities at the Middlesboro facility to upper corporate management who made the decision to relocate the production work. As the Judge found, it is well established that the Board imputes a manager's or supervisor's knowledge of an employee's protected concerted activities to the decision maker, unless the employer affirmatively establishes a basis for negating such imputation. *G4S Secure Solutions (USA), Inc.*, 364 NLRB No. 92, slip. op. at 3 (2016); See, *Vision of Elk River, Inc.*, 359 NLRB 69, 72 (2012).

Counsel for the General Counsel submits that Respondent's argument fails because Board precedent does not require direct evidence that the manager who took an adverse employment action against an employee personally know of the union activity.

The record evidence shows, and the Administrative Law Judge correctly found that the various threats of plant closure in retaliation for R. Hatfield's union activities and disparagement were violative of the Act but also displayed animus towards the Union and R. Hatfield. (ALJD p. 31, ll. 31-39)

The Judge correctly further found that Respondent's requiring union employees to go to the new facility in Clinton, Tennessee to apply for a job provided additional evidence of union animus. (ALJD p. 32, ll. 17-30) *Allied Mills, Inc.*, 218 NLRB 281 (1975).

Allied Mills, Inc., supra., a pre-*Wright Line* case, however, is strikingly similar to the instant case. *Allied Mills, Inc*. involved the discontinuance of operation of a long-term unionized plant for economic reasons (too old, inefficient and uneconomic for profitable operations) and the simultaneous opening of two new plants which continued production in substantially the same manner. The employer refused to discuss the transfer of the unionized employees to either of the two new constructed plants and required the employees of the closed plant to physically go to the new plants to apply for continued employment. The Board affirmed the Administrative Law Judge's finding that requiring employees from the closed unionized facility to apply for continued employment was indicative that the employer utilized its move to rid itself of the union. The Administrative Law Judge also noted that although the decision to close the one plant and build two new plants were made by **top** (emphasis added) management that the record reflected the anti-union remarks made by the employer's agents at meetings and the 8(a)(1) threats made by the acting superintendent could not be overlooked in assessing the employers motivation.

Counsel for the General Counsel respectfully urges the Board to affirm the Administrative Law Judge's finding with respect to the motivation behind Respondent's relocation of the Middlesboro work to Ohio, Georgia and Tennessee.

Similarly, in *Vico Products, Co*., 336 NLRB 583 (2001), enfd. 333 F. 3d 199 (D.C. Cir. 2003), after a successful union organizing campaign the employer relocated its caliper pin production work from Michigan to Kentucky without bargaining with the union. During the organizing campaign one of the part-owners made threats of layoff to two employees if the campaign was successful. During the same period, a comptroller told a group of employees that there were going to be changes made when the union was voted in and there may not be jobs left. Neither of these comments were independently alleged in the complaint but the Board, in reversing the Administrative Law Judge, found that these statements were evidence of antiunion animus and motivation. In so finding, the Board held that the employer violated Section 8(a)(1),(3) and (5) when it relocated its production work from Michigan to Kentucky. Id.

In the instant case, the record is replete with evidence of union animus and motivation for the relocation of the Middlesboro work since at least 2013, after the most recent contract negotiations concluded, Jeff Hatfield, foreman, and Mike Roark, production manager told Elmer Evans, former unit president, that would be the Union's last contract. (Tr. 121-122) Evans credibly testified and the Administrative Law Judge so found, that between April 2013 and December 2015, Evans had similar conversations with various managers and supervisors.

Other evidence of motivation and animus are displayed in many of Respondent's internal documents which repeatedly mentioned the Union. (Resp. Ex. 3) One of the limitations set out in the power point presentation requesting appropriations for a new facility lists its inability to operate all lines 24x7 (union contract limitation)." (Tr. 326-327; Resp. Ex. 3) Respondent considered its only unionized facility, its contract limitations, and the vigorous policing of the contract as an albatross around its neck. Therefore, they kept the initial announcement of its closing from the employees and the Union as long as it could. Management, admittedly, wanted to close the Middlesboro facility before negotiations began on a successor collective-bargaining agreement. (Tr. 307-308; Resp. Ex. 4 and Resp. Ex. 6)

Even after Respondent announced the Middlesboro closing to its employees, management and supervisory officials continued telling employees that R. Hatfield and the Union's grievances were the reason for the closing. (Tr. 66, 68, 89-92, 106-108, 112, 158, 177)

In December 2015 Respondent made good on its numerous threats and closed its Middlesboro facility.

Counsel for the General Counsel respectfully submits that the Board affirm the Administrative Law Judge's findings that he Union and the Union's grievance filing activities was the motivating factor in Respondent moving its production work at its Middlesboro facility to Elyria, Ohio, Sandersville, Georgia and Clinton, Tennessee in an effort to rid itself of the Union and such relocation was a violation of Section 8(a)(1) and (3) of the Act.

B. <u>The Administrative Law Judge Correctly Found That Respondent Would Not Have Made the Same Decision to Move Absent the Union</u>.

Respondent excepts to the Administrative Law Judge's finding that none of the credited evidence demonstrated that Respondent would have closed its Middlesboro facility absent the employee's protected conduct.

In *T & J Trucking Co*., 316 NLRB 771 (1995) the Board, in affirming the Administrative Law Judge's findings and conclusions, held that where there is a finding that the reason for the discharge is pretextual, the employer's *Wright Line* defense fails. Id at 772-773. In the instant case the Administrative Law Judge correctly found that the reason proffered by Respondent for relocating its Middlesboro production work was pretextual. The Judge noted that all of Respondent's economic justifications for the relocation were embedded with references to the unionized status of the Middlesboro workforce. (ALJD p. 33)

Respondent mistakenly relies on *Dorsey Trailer, Inc. v NLRB*, 233 F.3d. 831 (4th Cir. 2000), which reversed the Board, as being instructive in this matter. In *Dorsey Trailers, Inc*., 327 NLRB 835 (1999), the Administrative Law Judge found, and the Board affirmed, that the employer's decision to close its most profitable facility had nothing to do with the need to maintain production, but was related more by a desire to retaliate against the strikers. The Administrative Law Judge also found that the suggestion that the employer might have been able to operate more profitably in the new (Georgia) location because of its alleged proximity to customers and incentives offered by the State of Georgia does not negate the fact that what motivated the employer to relocate in the first place was a desire to rid itself of its problem work force and to avoid any further bargaining obligation with the union. Id. at 863.

In *Dorsey Trailers*, the Fourth Circuit reversed the Board with respect to the finding that the employer rebutted the General Counsel's *prima facie* case concerning the closing and relocation of its most profitable plant. The Court found that the economic reasons advanced by Dorsey drove the employer to move the plant. The Court held that the Board ignored the employer's economic reasons. The Court considered that the employer began its search for a new facility after the union engaged in an unfair labor strike in order to fill backlogged orders, and not because of antiunion animus. The Court further found that the employer risked losing a large amount of business if it was unable to fulfill its obligation due to the strike. The Court pointed out that the employer even tried to find other ways to fill its orders. The Court also noted that the State of Georgia offered several financial incentives in support of the relocation - a new worker's training program, a tax credit per employee, and a 20 percent reduction in utility costs. None of those factors are present in the instant case, to wit, there was no immediate necessity requiring Respondent close its most profitable facility, with an experienced and skilled work force. Moreover, there was no evidence presented of any state provided (Tennessee) incentives. Unlike in *Dorsey Trailers,* the record is replete with evidence that from the beginning of Respondent's initial proposal to relocate its Middlesboro plant the mention of the Union was embedded in all of its correspondence and capital expenditure request. As the Administrative Law Judge found, Respondent linked the presence of the Union, the limitations imposed by the Union, and its desire to avoid bargaining with the Union, with the closure of the Middlesboro facility.

It is well settled that the Administrative Law Judge is bound by the law established by the Board and was correct in finding, for the stated reasons, (ALJD p. 33, ll. 22-43) that Respondent did not carry its rebuttal burden. Counsel for the General Counsel submits that the Administrative Law Judge did not ignore Respondent's economic defense. Counsel for the General Counsel respectfully urges the Board to affirm the Administrative Law Judge's finding.

C. The Judge Correctly Found That Respondent Unlawfully Changed the Amount of its 2015 Thanksgiving Bonuses to Unit Employees.

Respondent excepts to the Administrative Law Judge's finding that it, without prior notice to the Union and without affording the Union an opportunity to bargain, reduced the amount of its 2016 Thanksgiving bonus in violation of the Act. Respondent relies on *Hotel Texas*, 138 NLRB 706, 712-13 (1962), enf'd 326 F.2d 501 (5th Cir. 1964); *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353-54 (2003) for the proposition that its reduction of its 2015

Thanksgiving bonus to the contractually agreed amount was not a mandatory subject of bargaining. Respondent correctly states that a longstanding practice can become a term and condition of employment.

Admittedly, the collective-bargaining agreement (Resp. Ex. 1, p. 31) set the Thanksgiving bonus at $16. However, for several years Respondent had increased the Thanksgiving bonus to twenty-five ($25). Matthew Craig, a 4-½ year employee, testified that he had received a twenty-five ($25) gift card for his entire employment until November 2015. Robert Hatfield similarly testified that to the best of his knowledge throughout his 8-year employment with Respondent that he received a twenty-five ($25) Thanksgiving gift card. (Tr. 160) Even Respondent's former human resources manager, Patsy Wilhoit, testified that for several years she received approval to provide a twenty-five ($25) gift cards. (Tr. 208) Wilhoit never denied that the increased gift card was given throughout Craig or Hatfield's employment. Clearly, this increased Thanksgiving card bonus had become a past practice because it was an activity that had been "satisfactorily established" by practice or custom; an "established practice," an "established condition of employment" and "a longstanding practice" (citations omitted) *Philadelphia Coca-Cola*, supra, citing *Exxon Shipping Co.*, 291 NRLB 489, 493 (1988). See also, *Golden State Warriors*, 334 NLRB 651 (2014); *Dow Jones & Co., Inc.*, 318 NLRB 544, 548 (1995). Counsel for the General Counsel submits that the Judge correctly fond that Respondent's increased Thanksgiving bonus gift card had become term and condition of employment due to its regularity and frequency and thereby a mandatory subject of bargaining.

Equally important, as early as April 2015, Respondent's corporate office approved a twenty-five ($25) gift card for Thanksgiving 2015 and Respondent posted a corporate Employee Recognition program notice setting forth several awards and bonuses for the entire year (2015) including the Thanksgiving gift card. (Tr. 110, 133-134, 160-11; G.C. Ex. 5) Wilhoit testified that she always sought approval before distributing a larger Thanksgiving bonus than established in the collective-bargaining agreement. (Tr. 208, 215) Wilhoit, incredibly testified that in 2015 she decided to seek a second approval for the increased amount of twenty-five dollars ($25). (Tr. 217) Wilhoit further testified that after receiving no response from corporate officials, Tamera Fraley, corporate human resource director, told her to just follow the contract. (Tr. 208, 217) Wilhoit failed to explain why a second approval for the increased amount was necessary, especially in light of the posted corporate Employee Recognition Program notice. (G.C. Ex. 5)

It is well settled that wages are mandatory subject of bargaining. An employer violates Section 8(a)(1) and (5) of the Act when absent a waiver, it changes wages or other terms or conditions of employment without offering the union the opportunity to bargain concerning the change. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1965); *NLRB v. Katz*, 369 U.S. 736 (1962) Counsel for the General Counsel asserts that the Thanksgiving gift card constitutes wages and therefore any change in it is subject to bargaining. *General Telephone Company of Florida*, 144 NLRB 311 (1963). General Telephone Company involved the discontinuance of a long standing Christmas check that was provided to all employees and management officials. The employer decided to discontinue the check 1 year so as not appear to the general public that it was requesting a rate increase. The union had acquiesced over the years in the employer's decision to provide these checks to employers and in the employer's unilateral decision to increase the amount of these checks and did not request bargaining over the matters. The Board found that the union had no reason to disturb an agreeable payment, but the employer's long standing custom of unilaterally paying the Christmas checks gave it no reason to expect that the union would not object if it discontinued the bonus. Id. at 315. See also, *The*

Register Guard, 301 NLRB, 494 (1991); *Century Electric Motor Company*, 180 NLRB 1051 (1970).

Counsel for the General Counsel submits that the instant case is analogous to *General Telephone*, supra. In the instant case, the Union acquiesced when Respondent unilaterally increased the contractual Thanksgiving benefit. Nevertheless, there was no reason for the Union to disturb this agreeable increase. However, absent a clear and unmistakable waiver, Respondent should expect the Union to object a reduction in this benefit. "A Union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time." *Owens-Corning Fiberglass*, 282 NLRB 609 (1987)

Counsel for the General Counsel urges the Board to affirm the Administrative Law Judge's finding that Respondent violated Section 8(a)(1) and (5) of the Act when it reduced the amount of its Thanksgiving gift card without notice to and without bargaining with the Union.

D. <u>The Administrative Law Judge Correctly Found That Respondent Violated the Act by Requiring Employees to Sign a Confidentiality/Non-Disclosure Agreement</u>.

Respondent excepts to the Judge's finding that the confidentiality agreement that it required Sean Chapman and others to sign (G.C. Ex. 1(dd)) was promulgated in response to union activity, and the finding that employees could interpret its language regarding "financial information" as prohibiting them from discussing their compensation.

General Counsel asserts the prohibition of revealing any of the defined "Confidential Information" to a third party is violative of the Act. The language specifically defines, in part, as Confidential Information "[Respondent's] business plans, <u>including particularly, but not limited to</u>, Dura-Line's plans for locating a facility in Clinton, Tennessee and its plans related to how other plants and locations may be impacted by the opening of the new facility as troublesome. Counsel for the General Counsel submits that this language is violative of the Act. In *Flamingo*

Hilton-Laughlin, 330 NLRB 287 (1999), the Board affirmed the Administrative Law Judge's findings with respect to the Disclosure rule that the employer maintained in its employee handbook to be violative of the Act. In *Flamingo Hilton*, the employer maintained a Code of Conduct rule that prohibited employees from revealing confidential information regarding their customers, fellow employees, or hotel business. The Disclosure rule states that "Much of the Hotel business is confidential and must not be discusses with any party not associated with the Hotel. You should use discretion at all times when talking about your work. The Hotel considers all information not previously disclosed to outside parties by official Hotel channels to be proprietary information. Questions or calls from news media should be immediately transferred and responded to by the Marketing Department or the President of the Hotel. At no time should you talk to the media about Hotel operations. If you should discuss or disclose proprietary information, you may be subject to disciplinary action, up to and including termination." The Administrative Law Judge found that these rules were ambiguous in applying the rationale set forth in *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995) and must be resolved against the Employer. *Aroostook County Regional Ophthalmology Center* Id., involved a rule requiring the discussion of grievances in private with the office manager or physicians. The Board, in affirming the Administrative Law Judge, held that the rule can reasonably be read to forbid employees from engaging in protected activity of discussing with one another grievances against the employer with a view to pursuing concerted action. The Board, however, reversed the Administrative Law Judge's finding that the second part of the rule prohibiting the discussion of grievances within earshot of patients was lawfully maintained. The Board held that such a rule which has no limitations as to time or place, is an overly broad restriction of employees' statutory right to engage in protected concerted activity. The Board noted that it had, with Supreme Court approval, established special rules concerning restrictions on the exercise of Section 7 rights in health care institutions. The Board noted that these rules require striking a balance between employees' statutory rights and the needs of the health care institutions.

Counsel for the General Counsel submits the rules set forth in Respondent's Confidentiality/Non-Disclosure Agreement are ambiguous at best. They are clear on their face that they are prohibiting the discussion of their business plans, including particularly, but not limited to its plans for locating a facility in Clinton. Tennessee…" Additionally, Wilhoit orally reiterated this rule when, about September 21st, she instructed Chapman not to discuss the closing, his wages or anything else with the unionized employees or anyone else. (Tr. 542) It is well settled that employees have a Section 7 right to discuss wages, hours and other terms and conditions of employment with fellow employees, as well as with non-employees such as a union representative. Therefore, an employer's policy that either specifically prohibits employee discussions of terms and conditions of work such as wages, hours, or workplace complaints or that employees would reasonably understand to prohibit such discussions violates the Act. *Flamingo Hilton,* supra.

In a subsequent case, the Board in affirming the administrative *Lutheran Heritage Village - Livonia,* 343 NLRB 646 (2004), established a three prong test. The Board held that if the rule explicitly restricts activities protected by Section 7 of the Act it will find the rule unlawful. Id. at 646 citing *Our Way*, 268 NLRB 394 (1983). The Board further held that if the rule does not explicitly restrict Section 7 activity, a violation will be dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity;

(2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

It is undisputed that Respondent's Confidentiality/Non-Disclosure Agreement as voiced by Wilhoit specifically prohibited Chapman's discussions about wages or his transfer to Respondent's Clinton facility. Counsel for the General Counsel submits that Wilhoit's oral recitation of this rule is violative of the Act. Equally important, with respect to Respondent's written rule Counsel for the General Counsel asserts that employees would reasonably understand it to prohibit discussions concerning their transfer to the Clinton facility with fellow employees.

Respondent relies on *Burndy, LLC,* 364 NLRB No. 77 (2016) involving a confidentiality agreement involving the employer's rule involving protecting group assets. This rule is clearly limited to safeguarding the employer's assets and the protection of third parties' proprietary information rights. The rule in *Burndy, LLC*, supra, does not contain language that states "including but not limited to" which is unclear and would tend to chill employees with respect to some actions, which could be viewed by the employees as running afoul of the rules.

In the case at bar, the Judge correctly found that the language in the confidentiality agreement is ambiguous and employees could interpret the ambiguity as a prohibition against disclosing or discussing wages and salary, which could be included in confidential information. (ALJD p. 46, ll. 3-5) See, *T-Mobile USA, Inc*., 363 NLRB No. 171 (2016).

Counsel for the General Counsel urges the Board to find that Respondent's written rule explicitly prohibits Section 7 activities. Counsel for the General Counsel further urges the Board to adopt the Administrative Law Judge's finding that Respondent's written confidentiality rule is also violative because it meets the first two prongs of the test set forth in *Lutheran Village*, supra.

-- employees would reasonably construe the language to prohibit Section 7 activity and it was also promulgated in part to prevent foreseeable union activity regarding its relocation.

Counsel for the General Counsel urges the Board to find Respondent's written Confidentiality/Non-Disclosure Agreement to be a violation of Section 8(a)(1) of the Act.

E. The Administrative Law Judge Correctly Ordered Respondent to Restore Production in Middlesboro.

Respondent excepts to the Administrative Law Judge ordering it to restore the transferred production work to its Middlesboro facility because it is unduly burdensome wand because Counsel for the General Counsel did not establish that Respondent closed its Middlesboro plant and moved production for antiunion reasons.

Counsel for the General Counsel again urges the Board to affirm the Administrative Law Judge's finding that the General Counsel established a prima facie case that the December 2015 shut down and clearly violative mass layoffs/discharges were the result of Respondent's discriminatory acts. The Administrative Law Judge correctly found that there were numerous threats of plant closure (both within and outside the statute of limitations period) in retaliation for their union activity, to wit, the prolific grievance filing activity of the current union president. Respondent admittedly was aware of the grievance filing activities and admitted that this activity increased when Hatfield became the union president. Through various actions, management and supervisory officials repeatedly indicated their displeasure with Hatfield's grievance filing activities by their various threats of closure if the grievances did not stop.

In *We Can, Inc.,* 315 NLRB 170 (1994), the Board held that "when an employer has curtailed operations and discharged employees for discriminatory reasons, the Board's usual practice is to order a return to the status quo ante – that is, to require the employer to reinstate the employees and restore the operations as they existed before the discrimination –unless the employer can show that such a remedy would be unduly burdensome." Id. at 174, citing *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989). See also, *Saigon Grill Restaurant, Inc.*, 353 NLRB 1063 (2009). Counsel for the General Counsel submits that Respondent failed to show at the hearing that such a restoration order would be unduly burdensome.

Counsel for the General Counsel urges the Board to affirm the Administrative Law Judge's decision and to adopt her recommended order.

CONCLUSION:

Based on the above and the record as a whole, Counsel for the General Counsel respectfully requests that the Board affirm the decision of the Administrative Law Judge and find that Respondent violated the Act as alleged in the complaint and issue an appropriate remedial order consistent with that recommended by the Administrative Law Judge as modified by Counsel for the General Counsel's previously filed limited exceptions.

Dated: August 28, 2017

/s/ Linda B. Finch

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CERTIFICATE OF SERVICE

August 28, 2017

I hereby certify that I served the attached Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision and its Brief Filed in Support Thereof on all parties by mailing true copies thereof by electronic mail today to the addresses listed below:

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